United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1183

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FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JAMES HORELICK,

Petitioner-Appellee,

against

THE CRIMINAL COURT OF THE CITY OF NEW YORK; DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; FRANK S. HOGAN, District Attorney, New York County; and BENJAMIN MALCOLM, New York City Commissioner of Correction,

Respondents-Appellants.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR PETITIONER-APPELLEE

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QUESTIONS PRESENTED

1. Did the District Court correctly find that the New York Court of Appeals had so changed the law of criminal trespass in affirming petitioner's conviction as to deny him due process of law?

2. Were the directives given to petitioner by agents of the state so conflicting that the conviction for his ac-

tions denied him due process of law?

STATEMENT OF THE CASE

In this bizarre case, the petitioner, James Horelick, who was a public school teacher in New York City, has been convicted of trespassing on two occasions during a strike in the very school where he was assigned to teach. He was convicted on the complaint and testimony of persons who supported the strike, despite evidence that he was caught in the middle between the strikers and a strong mandate from the Board of Education to teach. It is his adherence to that mandate which the state has sought to punish by criminal conviction.

In the fall of 1968, there was a major strike of teachers in the public schools of New York City. As the state Court of Appeals said in the companion case to this one, People v. Adickes, 30 N.Y.2d 461, 463 (1972)(App. p. 44a), it was "concededly an illegal strike." The illegality lay in the fact that the Taylor Law, 9 McKinney's Consolidated Laws of New York §210, subjects public employess who strike to severe

penalties, including fines and possible dismissal. An earlier phase of the strike had been enjoined under state law in September, 1968, some weeks before the events at issue here, and the leaders had been held in contempt. Rankin v. Shanker, 23 N.Y.2d 111 (1968).

Despite the strike's illegality, Washington Irving High School on Irving Place in Manhattan had not been physically open for some days before October 17, 1968. (T. 269, 351). Although teachers, including Mr. Horelick, and students had come there to teach and attend school each day, the custodian refused to open the doors.

Events of October 16, 1968 and the morning of October 17, 1968 had raised the hopes of those gathered in front of Washington Irving High School who wanted to go to school. The Board of Education had decided to force the issue, and on the evening of October 16, 1968, John Doar, the new President of the Board, issued a public statement (summarized by the District Court, App. p. 16a-17a; printed in full, App. p. 32a). He testified at Mr. Horelick's trial in words which were at the heart of the case. (T. 426).

> THE WITNESS: The reason for issuing that statement, Your Honor, was the fact that some

> of the employees of the Board were illegally, without authority closing the schools and locking them. Custodians and principals who were in sympathy with the strike were refusing to abide by the orders of the school board. We issued this statement.
>
> THE COURT: You say just to clarify the statement of the overall board?
>
> THE WITNESS: More. It was to tell publicly employees of the Board and custodians and we want to make it clear even if one teacher would want to go to school to teach that the school would be open, one teacher and that statement caused considerable misunderstanding.

Jack Landman, as Acting District Superintendent, had the power to open the school (T. 241-242). On the morning of October 17th Edward Williams, chairman of Washington Irving's mathematics department (T. 286), sought and obtained a letter from Mr. Landman (Defendant's Exhibit A, App. p. 30a), making him teacher-in-charge of the school. Mr. Landman intended by the letter to put Mr. Williams in charge of the building (T. 245) and intended that the letter should be shown to the custodial staff and other teachers (T. 25a).

The principal of Washington Irving High School, who testified that he was sympathetic to the strike (T. 168) was

present outside the school. When the letter was shown to him, rather than unlock the doors, he referred the letter to the custodian.[1] (T. 174, 286-287). The custodian refused to unlock the school; the custodians as a body joined the strike that very day, October 17, 1968 (T. 252).

Mr. Williams made a futile trip back to Mr. Landman, whereupon all recognized that those sympathetic to the strike had effectively thwarted the order of Mr. Doar. Mr. Williams, the teacher-in-charge, told the other teachers that if they could get into the school, "it was our building," (T. 289), or words to that effect (T. 318, 358, 376, 394). At his direction,[2] everyone dispersed, looking for "some way of getting into the building so that we all could go inside andestablish a school there" (T. 290, 319). Mr. Horelick alone succeeded; he simply climbed in a window which "was not only unlocked but open" (T. 360). Hearing that Mr. Horelick had got in, the teacher-in-charge ran

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[1]The principal claimed he had "closed" the school as noted in Appellant's Brief p. 4., but he admitted he was subject to the orders of the Superintendent of Schools and Mr. Landman (T. 159-161).

[2]The Attorney General's Brief blandly asserts (p. 11) that Mr. Horelick had not physically read the letter, or questioned Mr. Williams about his right to enter. It ignores the proven fact that Mr. Williams told the group that the letter meant they could enter the school.

around to the entrance because he had the letter of authorization, and had to be present when the building was opened (T. 291).

The building was not, however, opened, The assistant custodian grabbed Mr. Horelick's coat, which came off.[3] As Mr. Horelick tried to open the door, he was arrested on the orders of the custodian and was subsequently charged with trespass and resisting arrest under the New York Penal Law, 39 McKinney's Consolidated Laws §§140.10 and 205.30, respectively.

The petitioner was arrested again on the evening of October 19, 1968, in the same school on an occasion when the school was open to the public for a concert. The same license and privilege of the Board of Education applied on that night as on the earlier occasion; if there was a difference, it was that the petitioner and his companions simply walked in the door instead of entering by an open window. Petitioner left when he was ordered to do so, but after consulting with a lawyer, he re-entered to ask that charges be lodged against the custodian for obstructing governmental administration (T. 180-181, 331, 369, 370). He was again arrested and charged

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[3]Appellants' Brief (p. 5) alleges that Mr. Horelick "struggled" with the custodian. There is not a word in the record indicating such a struggle (T. 87, 99).

with criminal trespass on the complaint of the custodian. Finally, on October 20, 1968, the Board of Education issued guidelines intended to clarify procedures for opening schools (App. p. 33a).

Mr. Horelick was tried in the Criminal Court of the City of New York before William Suglia, J., without a jury, together with his co-defendant, Sandra Adickes, who was accused of interfering with his arrest of October 17, 1968. Both were found guilty of all charges against each of them, and the petitioner was sentenced to a fine of $500 or a term of 60 days. After serving a few days, he was released on a certificate of reasonable doubt. He appealed through the state courts on the grounds, noted by the District Court, that he had a bona fide claim of right to be in the school, and that the application of the statutes to him denied him due process of law under the First and Fourteenth Amendments (App. p. 11a, 28a n. 11).

Despite the overwhelming evidence of a mandate to go to school and teach, the state Court of Appeals affirmed the petitioner's conviction by a divided vote of four to three. (App. p. 36a). In an unprecedented decision, the majority held that:

> the issue turns on whether the affected teacher had a "license" or "privilege" to open the school by surreptitious entry and force,[4] and not whether they had right or duty to be in the school. (App. p. 39a).

The majority purported to rely on the ancient law of forcible entry and detainer (App. p. 36a). The petitioner made a motion to reargue, chiefly bottomed on the issue presented to the District Court (App. p. 12a), and then sought a writ of certiorari from the United States Supreme Court, which was denied.

The day before he was to serve the remainder of his sentence, he came to the District Court for relief by way of habeas corpus. The District Court held that Mr. Horelick had been denied due process of law because the majority of the state Court of Appeals had so changed the law of criminal trespass in effect at the time of Mr. Horelick's actions as to create an ex post facto law under which he did not have fair notice of what was forbidden. The Court found it unnecessary (App. p. 28a n. 11) to pass upon his claims that he had been sub-

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[4]As the District Court found (App. p. 12a), there was no evidence whatever of entry by force.

jected to directives from either side of the strike controversy so contradictory as to deny him due process of law and render the statute, as applied, unconstitutionally vague.

The Attorney General appeals from that ruling.

ARGUMENT

I. THE PETITIONER COULD NOT HAVE BEEN CONVICTED UNDER NEW YORK LAW APPLICABLE AT THE TIME OF HIS ARREST.

The Attorney General's brief seeks to avoid the conclusion of the District Court (App. p. 17a) that:

> ...as the law of trespass stood at the time he was charged with it, he [James Horelick] could not have been found guilty.

That law was that a bona fide claim of right, even if mistaken, was a defense to a charge of criminal trespass. (App. p. 16a). All the authorities cited in the Attorney General's brief (p. 10), all the authorities cited by the District Court (App. p. 15a-16a), and, as will be more fully discussed below, all the authorities cited by the New York Court of Appeals either established or were consistent with this conclusion. The

Attorney General, for example, makes much of a Family Court case, Matter of Ray D.R., 70 Misc. 2d 184, 333 N.Y.S. 2d 272 (Fam. Ct. Kings Co, 1972), because there trespass was inferred from the fact that the respondent had forced open a door, but it only serves to emphasize the point above. To analogize to this case, if the juvenile in that case had been able to show a written invitation from the owner to persons similarly situated, for example, to teen-agers, the fact that the watchman of the premises was unaware of or refused to recognize the invitation, would not have made the invitation any the less effective as a defense to the charge of trespass.

The thrust of the law of criminal trespass as it existed before the decision in this case was not an obscure or techinical doctrine. The point was that when there was such dispute over rights in a piece of property as to create a bona fide disagreement, one party to the dispute was not to be permitted to punish the other for reliance on that bona fide claim. The law of civil trespass, upon which the Attorney General so heavily relies (Brief, p. 15) serves the quite different purposes of settling which claim was valid (even when both might be bona fide) and of ascertaining damages. Strict

liability might be appropriate for these purposes, although it was not suitable for determining criminal intent. The distinction is summarized even by authorities cited in the appellant's brief. See brief, p. 10, Denzer and McQuillan, Practice Commentary, 39 McKinney's Consol. Laws of New York, at 347 (1967 Ed.):

> ...a person who trespasses upon premises accidentally, or who honestly believes that he is licensed or privileged to enter, is not guilty of any degree of criminal trespass. In other words, the offense is not one of strict liability, whatever the rule of civil liability may be for negligent trespassing.

The recognition of bona fide claim of right as a defense in the New York law of criminal trespass embodied a salutary rule, precisely for the reason revealed by the facts of a case like this one. Here one party--custodians and others sympathetic to the strike--locked the schools in defiance of express orders of superiors. The strike was "concededly" illegal, and had been lawfully enjoined, and the teachers had a duty to come to school and teach. In this legal situation, the Board of Education, the highest authority in the schools,

made an express invitation to teachers down through a clear chain of command. One of those teachers, finding his way blocked by those who defied the Board's orders, sought, by a means which involved no force, to open his school to teachers and students. In the case of such a bona fide claim, the law of criminal trespass did not provide for a penalty.

Confronted with this state of the law, the state Court of Appeals ruled (App. p. 39a):

> The issue turns on whether the affected teachers had a "license" or "privilege" to open the school by surreptitious entry and force, and not whether they had a right or duty to be in the school (Penal Law §140.00, subd. 5.)

To the rules embodied in the law of criminal trespass, the question whether the entry was "surreptitious" had been utterly foreign. It could hardly have been otherwise, because when rights of entry on property are disputed, it is evident that one party should from time to time gain entrance without the knowledge of the other, if only to avoid physical conflict. As written, the ruling of the state Court of Appeals perhaps reaches even to the case of the husband, who, excluded by an

irate spouse, seeks to climb in through a window.

The state Court of Appeals sought to justify its importation of a totally new idea into the law of criminal trespass with these words:

> The issue is whether the resort to self-help by "breaking and entering" in the classic sense, is permitted, an issue laid to rest long ago by successive and ancient statutes relating to forcible entry and detainer...

In canvassing the law of forcible entry and detainer in New York, the District Court found correctly that nothing in that body of law supported the proposition that mere "self-help", or anything in the actions of Mr. Horelick, could be made into a crime. (App. p. 18a-19a). See, e.g., Fults v. Munro, 202 N.Y. 34 (1911); Drinkhouse v. Parka Corp., 3 N.Y.2d 82 (1957). Laws against forcible entry and detainer were not directed against trespass at all, but against the entry vi et armis upon property. In the words of the latter case, 3 N.Y.2d at 91, quoted by the District Court at greater length (App. p. 19a):

> Mere trespass does not give rise to such an action, even when it is accompanied by

'wrenching off the lock'....

The citations advanced by the state Court of Appeals, (App. p. 36a), were not to the contrary. To take an example, Section 2034 of the old Penal Law had been dropped in 1967.[5] The few cases decided under it had uniformly held that some actual violence or terror, more than a mere trespass, was required for a conviction. People v. Baldwin, 74 Misc. 384, 134 N.Y.S. 221 (Erie Co. 1911); People v. Samon, 31 Misc. 2d 975, 221 N.Y.S.2d 277 (Herkimer Co. 1961). The same rule had been the common law of England for hundreds of years, Hawkins, Pleas of the Crown, chapter 28 subdivision 3, "Of Forcible Entries and Detainers," Section 26 (1824 Ed.), and more recently of this country, 2 Anderson, Wharton's Criminal Law and Procedure, chapter 35 §869 (1957 Ed.). The words of the majority of the Court of Appeals were, under New York and common law, nearly incomprehensible.

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[5] §2034. Forcible Entry and Detainer. A person, guilty of using, or of procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and the manner allowed by law, is guilty of a misdemeanor.

As with the law of criminal trespass, the law of criminal forcible entry and detainer had not been a set of bare technicalities. The point was that one might assert a bona fide claim of right, even if mistaken, by a trespass, but even ownership itself would not excuse the use of actual force and violence to get on the land. In this case, the state Court of Appeals attempted to assimilate such "self-help" as opening a window to the "violence" of a forcible entry and detainer. But almost any entry, including that necessary for a trespass, involves self-help, and it was the consistent purpose of American and English law to distinguish forcible entry and detainer from a mere trespass, the reason being that a claim of right was not a sufficient defense when extraordinary force was used.

As the District Court held, there was no proof of, nor even any attempt at proof of violence or riot (App. p. 19a-20a). The state Court of Appeals, for lack of other evidence, sought to rely on the charge of resisting arrest to buttress the charge, but that is irrelevant, because it occurred after Mr. Horelick had entered. Neither the defense nor the prosecution had any reason even to mention violence in connection with trespass, because it was irrelevant.

II. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS HAS DENIED PETITIONER DUE PROCESS OF LAW

The decision of the New York State Court of Appeals denied James Horelick due process of law in three ways, all of them inter-related. First, as held by the District Court, the decision of the state Court of Appeals so changed the law that Mr. Horelick was without fair notice and an opportunity to defend -- he was subjected to an ex post facto law. Second, the decision of the state Court of Appeals made the law so uncertain and vague that persons in Mr. Horelick's position could not conform their conduct to it. Lastly, the directives given Mr. Horelick were so contradictory as to constitute a denial of due process of law and a form of entrapment. The last two points were not reached in the District Court (App. p. 28 n. 11).

Ex Post Facto Law

The previous point has established that the doctrines of law which were relied on to sustain the conviction by the state Court of Appeals in People v. Horelick were not contained in

the New York law of criminal trespass on October 17 and October 19, 1968. As the District Court held, such a determination created an ex post facto law (App. p. 22a). It is not necessary to review in detail the authority of Cole v. Arkansas, 333 U.S. 196 (1948), Bouie v. City of Columbia, 378 U.S. 347 (1964) and Rabe v. Washington, 405 U.S. 313 (1972), ably explained by the District Court (App. p. 20a-22a). Briefly, Cole was a case in which a conviction was obtained under one section of a statute and upheld under another; in Bouie, the state criminal trespass statute had been held applicable by the state courts when an element of the crime previously recognized was missing; in Rabe, an obscenity conviction for showing a film was upheld only by addition of an element (the context of the showing) which had never previously existed. This case resembles all three of the decisions. The affirmance of Mr. Horelick's conviction may be viewed as a conviction upon a charge not made, as a refusal by the courts to recognize a previously existing element (the claim of right), or as a conviction based upon the "context" of the events -- that is, the public school strike. All of these cases are bound together by the principle that the state court decisions effectively denied fair notice and an opportunity to defend.

The lack of notice of what conduct was forbidden is striking in this case. Mr. Horelick had no warning that the privilege to enter the school was inoperative if he used any sort of "self-help" at all.

The lack of opportunity to defend against the charge upon which the Court of Appeals affirmed is equally obvious. If Mr. Horelick had known that he was obliged to "resort to the courts" (App. p. 39a)to enforce his rights, then he could have proved that an injunction had already been entered against the strike in the state courts in September of 1968. Rankin v. Shanker, 23 N.Y.2d 111, 293 N.Y.S.2d 625 (1968). If either the District Attorney or Mr. Horelick's attorney had known that "incipient riot" was in some way relevant to a charge of criminal trespass, the prosecution could have tried to prove its existence, and Mr. Horelick's attorney certainly would have shown its absence. It was not relevant at the time the charge was brought and no attempt to prove or disprove it was undertaken.

The due process doctrines embodied in Cole, Bouie and Rabe have been applied in federal decisions on writs of habeas corpus for state convictions. In United States ex rel. Mishkin v. Thomas, 282 F. Supp. 729 (S.D.N.Y. 1968), Mishkin had been

convicted of obscenity in the New York courts upon evidence seized unlawfully, but before the development of the Mapp rule. Assuming that the state courts were not obliged as a matter of constitutional law to apply the Mapp rule to Miskin's appeal while it was pending, Judge Frankel found that the New York courts actually had been applying Mapp to appeals pending at the time of that decision. Mishkin's appeal and state coram nobis were pending at and after the time of the Mapp decision, and the state "single[d] out this petitioner, accidentally or purposely, and den[ied] him procedural rights it accorded to others, before, during and after his appeals" 282 F. Supp. at 736-737. In discussing the applicability of the due process clause, Judge Frankel said:

> In a different but apposite context, the Supreme Court has often held that an "unforeseeable and unsupported" departure from existing state law does not constitute an adequate nonfederal ground of decision sufficient to preclude federal review. That familiar rule involves a "basic due process concept." Bouie v. City of Columbia, 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L. Ed.2d 894 (1964).... 282 F. Supp. at 737-738.

This case is actually easier to resolve, on its facts,

than United States ex rel. Mishkin v. Thomas, because here it is evident that the substantive charge and not simply a procedural protection for the petitioner, was changed after the conviction. It is as though Mishkin had been convicted of obscenity and his conviction affirmed on a new theory of law (which is, of course, what happened in Rabe v. Washington, supra). See also, Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), applying the principle in Bouie to a habeas corpus based upon an increase in the punishment after conviction.

Choung v. People of the State of California, 320 F. Supp. 625 (E.D. Cal. 1970) is closer to this case on its facts. There the petitioner, who entered a public school to participate in a protest against allegedly discriminatory teaching methods, was convicted under a California statute penalizing entry into a school "without lawful business" (interpreted to mean "for an unlawful purpose") and in a manner "to disrupt the school." The denial of due process arose because

> Notwithstanding petitioner's repeated demands for the statutes upon which the prosecution hoped to prove entry "without lawful business," the state did not reveal its "theory" that petitioner entered the campus for the purpose of causing, or tending

> to cause, minors to become habitual truants until the close of its case. 320 F. Supp. at 630.

The vice of this practice, the District Court ruled, was that it "left the prosecution free to roam at large -- to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." 320 F. Supp. at 630. See also, LaFond v. Quatsoe, 325 F. Supp. 1010 (E.D. Wisconsin 1971)(conviction for contributing to delinquency of a minor upon charge of sexual intercourse with a child held denial of fair notice, in a habeas corpus proceeding).

The formal difference between Choung and the present case is that in that case the prosecution did not elect a theory which would render the phrase in the applicable statute sufficiently specific to give notice until the close of the trial, whereas in this case, a theory which would defeat the claim of right upon which Mr. Horelick relied was not found until the highest level of appeal. The lack of fair notice is, if anything, even more extraordinary in this case.

The opinion in Choung points up the similarity of the doctrine requiring fair notice and that forbidding excessively vague charges. Such devices both make it impossible for a defen-

dant to answer or defend and allow leeway for discriminatory prosecutions and affirmances. The prosecutor can bring charges and the courts can affirm them, as they see fit. The predictability required by the rule condemning ex post facto laws partakes of the policy against discriminatory prosecutions as well as that against charges for which no defense can be prepared. Each of them expresses a different facet of the justification for the general rule of due process requiring that a defendant must have notice before trial of the charges against him.

Vagueness and Overbreadth

When the criminal law gives contradictory directives, a classic case of vagueness is created. In United States v. Cardiff, 344 U.S. 174 (1952), the Supreme Court held that a conviction under the Federal Food, Drug and Cosmetic Act violated due process because by making inspection dependent on consent in one section of the law and making refusal to allow inspection a crime in another, it failed to give fair warning that failure to consent to inspection was a crime. Id. at 176. So here, contradictory directives were established for Mr. Horelick. On the one hand, he had a statutory duty to teach; the law forbade

him to participate in the strike; an injunction had been issued against the strike; the Board of Education had just issued a flat statement that schools were "open" if even one teacher and one student appeared; and a teacher-in-charge had been appointed who encouraged him as well as others to open the school. All these directives and rulings ran counter to the opinion of the custodian that the school was "closed." For a defendant caught between those directives, a conviction is a denial of due process of law.

The strictures against vagueness must be applied with particular care in a case like the present one. The three principal Supreme Court decisions discussed above which embody the different aspects of the fair notice doctrine, Bouie, Rabe and Cole, all occurred in a context in which the convictions created a risk of interference with free speech. Bouie involved a peaceful sit-in; Rabe a conviction for obscenity; Cole a conviction of labor organizers who led a strike. The constitutional dangers of discriminatory application and vagueness are greater in such cases, because people, not being able to predict what is punishable, will steer "far wider of the unlawful zone" into the zone of self-censorship. Speiser v. Randall, 357 U.S. 513, 526

(1958). In this case, the New York Court of Appeals has made the trespass laws unpredictable during the pendency of public strikes, and especially for schools. During public strikes now, public employees do not know when they can enter the premises where they usually work. Whichever group happens to be in control, either strikers or non-strikers, can bring about an arrest and conviction. Publicly employed teachers, moreover, cannot predict whether they have the power to enter their appointed academic teaching places when some dissident faction chooses to exclude them. This problem of uncertainty, as it relates to teachers, is independent of a strike situation. A local board, or a mere group of teachers, can now shut the doors against a teacher they do not like, and menace him or her with a serious threat of conviction if a surreptitious but peaceable entry is made. With increasing decentralization, for example, it is not at all difficult to imagine a local governing board excluding some teacher, even for such impermissible reasons as race or doctrine, in defiance of a Board of Education order, and then bringing a prosecution for trespass. Plainly, under the precedent set in this case, teachers must mollify the group in power, or else stay out of their schools when told to do so by persons in the dominant group.

When teachers are cast into a situation where they fear even to enter their schools, apprehending enforcement of vague or discriminatory laws, academic freedom is the loser. In the words of Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957), "Scholarship cannot flourish in an atmosphere of suspicion and distrust." The point here is that the basic due process doctrine of fair notice is of especial importance in academic and labor disputes.

Entrapment

The conflict in directives described above created a situation where the government gave Mr. Horelick a license, encouraging him to go to school, and then arrested him for it. The Supreme Court has held that such conduct by the State constitutes a kind of entrapment which denies the individual due process of law.

In Raley v. Ohio, 360 U.S. 423 (1959), petitioners relied on the permission of a state legislative commission in claiming their Fifth Amendment privilege against self-incrimination in response to questions posed by the Commission. Although, in fact, state law granted the petitioners immunity and thus purported to

make criminal such refusals to answer, the Supreme Court reversed convictions for such refusals because the petitioners could show reasonable reliance on the Commission's assurances that the Fifth Amendment privilege was available. Neither the fact that these assurances came from a government agency with no immediate control over law enforcement, nor the fact that they were legally incorrect deterred the Court:

> After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State -- convicting a citizen for exercising a privilege which the State had clearly told him was available to him. 360 U.S. at 425-426.

See also, Cox v. Louisiana, 379 U.S. 554, 571 (1965); United States v. Laub, 385 U.S. 475, 485-487 (1967) (State Department's announced interpretation of a statute "estopped" the Justice Department from bringing a criminal prosecution for acts not deemed illegal under that interpretation). See Note, Applying Estoppel Principles in Criminal Law, 78 Yale Law Journal 1046 (1969).

So here, the Board of Education had instructed their employees that the schools were open despite the illegal strike, thereby strengthening and clarifying a teacher's right to go for

the purpose of teaching into the school to which he was assigned.

Under state law, moreover, petitioner Horelick had a duty as well as an invitation to act, thus making an a fortiori case of Cox and Laub, in which the defendants had only official permission, but were under no duty. As the dissenting judges in the New York Court of Appeals pointed out, the Board's directive created a duty on defendant's part to be in school. Under the Taylor Law, failure to perform this duty subjected defendant to possible removal from his position, disciplinary action or fines of double his salary for each day he stayed out. Convicting defendant for what he was duty-bound to do, especially after renewed requests to perform his duty, put him in an untenable position. The government may not, without violating due process, create a duty upon a citizen to do something, and later punish him for following that order. Raley v. Ohio, supra; Note, Applying Estoppel Principles in Criminal Law, supra.

This review of the case under the aspect of "entrapment by operation of law," as it may be called, brings us full circle. One of the purposes of such ancient doctrines as the one recognizing the bona fide claim of right as a defense to a

charge of criminal trespass has been to preserve the fundamental fairness which the decision in People v. Horelick lacks. Where a person believed, and had a colorable reason to believe, that he could enter upon land, then it created an untenable situation to convict him of the crime of trespassing. In many cases, like this one, the claim of right may take the form of an invitation, express or implied, and that is the situation particularly where the party in possession may not be permitted to punish the person invited. But when the invitation is issued by a government agency, and that same government then seeks to punish the man who responded to it, the case rises to a special level where there is a denial of due process of law by reason of inconsistent directives. The state Court of Appeals has changed the trespass law to make possible a conviction even with such inconsistent directives, thus permitting vengeful acts by one party against another. Such a state of the law is invalid either on the view that it creates a vague law, or that it entraps the innocent.

III. THE STATE HAS MISCONSTRUED THE ISSUES IN THIS CASE

The "Questions Presented" at page 1 of the Attorney General's Brief are in fact not the questions presented by this case at all. The Attorney General represents that the Court below made de novo findings of fact about Mr. Horelick's claim of right, as though the state Court of Appeals had made contrary findings, which was not the case. The three dissenting judges held that under law existing before the decision, Mr. Horelick had a colorable claim of right (App. p. 42a) and the point is that the majority did not disagree, but instead held that the old-fashioned claim of right was irrelevant to this case.[6]

Judge Lasker in the District Court was aware of this (App. p. 16a-17a). He made no new findings of fact with relation to the claim of right, but merely canvassed the existing findings to show that the state Court of Appeals had in fact

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[6]The Attorney General seeks to buttress his point by saying that the trial court found no valid calim of right (Brief, p. 12). But that was an impossible factual position to support and the Court of Appeals did not rely on it. (Opinion of District Court, App. p. 16a). When the highest court of

actually held that a bona fide claim of right was not a defense to a charge of criminal trespass in this case. After reviewing the facts of the trial and what the majority and the dissent had written about them, he said (App. p. 17a):

> As Judge Bergan's opinion sums it up, "Mr. Horelick was assigned to this school and his right --indeed his duty under the Board's directive -- was to be there in spite of an illegal strike." 30 N.Y. 2d at 459. When "the highest authority in the school system had published a directive advising that the schools would remain open and inviting teachers to come to work" (id. at 459-460), we conclude, as did the dissenting judges, that the argument that Horelick did not have a colorable claim of right simply lacks basis in fact.[7]

The point is that the majority of the Court of Appeals did not find it necessary to disagree with the dissent. As the

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[6](continued from preceeding page)
of a state relies on a ground different from the trial court to sustain a conviction, because the ground below cannot be sustained, the defendant is entitled to his rights under the decision of the highest court. See Cole v. Arkansas, 333 U.S. 196 (1948).

[7]If this "lack of basis in fact" were the ground of the decision, which it is not because the state Court of Appeals created new law to fit the facts proved, the Attorney General concedes that a due process issue would have been raised. Brief, p. 9.

District Court put it (App. p. 17a):

> The majority opinion of the New York Court of Appeals affirming the conviction implicitly recognizes that the law of trespass alone could not sustain it.

That conclusion gives rise to the legal consequences set forth in the foregoing points and in the District Court opinion: that Mr. Horelick, having been subjected to conflicting directives and his criminal trespass conviction thus not being predictable under existing law, has been denied due process of law.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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